

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-161 (Formerly DRB 08-438)
District Docket No. XIII-2007-0018E

IN THE MATTER OF :
KENNETH S. MEYERS :
AN ATTORNEY AT LAW :
:

Decision

Argued: July 16, 2009

Decided: September 29, 2009

Michael Rogers appeared on behalf of the District XIII Ethics Committee.

Respondent appeared pro se.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was originally before us on a recommendation for an admonition filed by the District XIII Ethics Committee ("DEC"). At our May 21, 2009 session, we determined to schedule the matter for oral argument.

The complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence) and RPC 1.4(b) (failure to communicate with the client). We determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1972.

On January 15, 1992, respondent was suspended for three years for gross neglect, lack of diligence, failure to communicate with the client in one matter, making misrepresentations to a court, and conduct prejudicial to the administration of justice. Specifically, respondent fabricated a judgment of divorce, caused a judge's false signature to be affixed to the document, and then asked his client to lie for him in court. In re Meyers, 126 N.J. 409 (1992). Respondent was reinstated on June 28, 1995. In re Meyers, 140 N.J. 51 (1995).

On July 16, 2008, respondent received a reprimand for gross neglect, lack of diligence, failure to promptly disburse closing proceeds, and recordkeeping violations, all in connection with a real estate transaction. In re Meyers, 196 N.J. 157 (2008).

The facts of this matter are as follows:

In May 2006, respondent represented Ahsan Nabi, the grievant, in Nabi's purchase of a house in Maplewood. Shortly thereafter, in October 2006, Nabi contacted respondent because

of water intrusion in the basement, a condition that had not been listed in the seller's disclosure form for the sale of the property. Respondent agreed to contact the seller's attorney in order to negotiate a settlement and, in the absence of a settlement, to file suit against the seller.

With no settlement in sight, in November 2006, Nabi sent respondent pictures of the wet basement, as well as estimates to waterproof the area, so that respondent could prepare a lawsuit against the seller.

According to Nabi, later that month, respondent agreed to file a complaint in Superior Court for damages caused by the water. Nabi claimed that, in telephone conversations with respondent, in November and December 2006, respondent assured him that a complaint had already been filed and that he was awaiting a reply from the seller's attorney regarding the matter.

Nabi also recalled respondent advising him that the seller had thirty-five days to answer the complaint. Based on that information, Nabi waited until early February 2007 to check further with respondent. Nabi claimed that, in February and March 2007 telephone conversations with respondent, respondent

again told him that he had filed the complaint and was awaiting action by the seller.

In late March 2007, when Nabi pressed respondent for copies of all filed documents in the case, respondent changed his story, admitting to Nabi on April 9, 2007, that he had not yet filed the complaint. According to respondent, the file had been misplaced in the office for months, and had only just turned up. According to Nabi, respondent then promised to file the complaint that day, "by 4 o'clock."

On April 10, 2007, Nabi received an email copy of a draft complaint from respondent. Angry about the delay, Nabi immediately sent respondent an email admonishing him for having wasted the prior six months, and stating that, during that time, respondent had misrepresented to him that a complaint had been filed. Nabi then asked respondent to give the matter his full attention, looking "forward to working with you and resolving this at your soonest."

At the DEC hearing, Nabi reiterated his belief that, between December 2006 and April 2007, respondent had "blatantly lied to us for a period of six months" about the status of the case. Nabi recalled that, once respondent admitted the truth, he had then offered his legal services at a fifty-percent discount

and, later, free of charge. Respondent was to be paid directly through Nabi's "ARAG" legal insurance plan, of which respondent was a member attorney.

Nabi recalled that, shortly thereafter, respondent told him that he had filed a complaint, but had not yet received back a filed copy. When Nabi found out, in July 2007, that the complaint had not yet been served on the seller, he immediately terminated respondent's representation.

Respondent, too, recalled the events surrounding the complaint, which he ultimately filed on April 25, 2007. He testified that the court clerk's office had been backlogged with complaints, in April 2007, and had not returned to him a file-stamped copy until a few days after Nabi's July 2007 termination of the representation. Thus, he claimed, without a filed copy of the complaint in hand, he had been unable to properly serve the defendant. In the interim, he had tried unsuccessfully to convince Nabi, who was upset with him, that he had, indeed, finally filed the complaint. He recalled having gone so far as to give Nabi the names and telephone numbers of personnel, in the clerk's office, with whom he had spoken about the matter.

Respondent admitted that, in the time leading up to the filing of the complaint, he had lacked diligence in the representation:

I had not, admittedly, in hindsight, worked diligently on it for two reasons. One, because, in fact, I could not find the file, I didn't know where it was. And secondly, as I said, I was hiring a new secretary and training her, I was working 12 hours as it was. The real estate closings had to be done for closing dates. Drawing the Complaint was admittedly something that I, you know, would do when I got to it.

[T35-10 to 18.]¹

Respondent stated that, during this time, he had been conducting twenty to thirty real estate closings per month as a sole practitioner. He conceded that, rather than look for Nabi's file, he had handled more pressing client matters and that "it was human nature to put it off."

With regard to RPC 1.4(b), respondent initially denied the charge that he had failed to adequately communicate with Nabi. He pointed out that he and Nabi had frequent communications about the matter between October 2006 and his July 2007 termination. He explained, however, that, in September 2006,

¹ "T" refers to the transcript of the September 23, 2008 DEC hearing.

right about the time he took on Nabi's matter, he hired a new secretary named Kim. He spent a great deal of time training Kim, but "had to let her go" because she did not work out. Among Kim's duties was the handling of all emails directed to respondent in the office. Because respondent was not computer-literate, she was charged with printing out emails and giving them to him, who would then prepare replies for her to send back in email form. He came to learn, however, that "things weren't getting done, realtors complained that she was not giving me messages when someone called. After she left my employment, I found other things that she had not done."

Nabi sent Kim periodic email inquiries about the case, which were intended for respondent. Respondent was shown a number of emails addressed to him, including one, dated April 23, 2007, in which Nabi indicated his intention to file an ethics grievance because of respondent's failure to file the complaint and his lies about the status of the case. Respondent testified with certainty that Kim had never shown him that email, as Nabi had only indicated his intention to file a grievance when he ended respondent's representation, in July 2007.

Respondent was asked about Nabi's claim that he systematically lied about having filed a complaint in December 2006. Respondent did not offer a flat denial. Rather, he recalled explaining to Nabi, on several occasions over the course of the representation, about the process of filing a complaint, the time within which the seller could file an answer, and other procedural aspects of the case. Respondent recalled, that, "[a]t various times I explained the procedure to Mr. Nabi. Whether I didn't explain it clearly enough or whether he fully didn't understand what I was saying, I'm not going to argue over that point."

When asked directly if he had ever told Nabi, before actually filing the complaint, in April 2007, that he had already done so, respondent replied:

I don't know the precise words that I used at that time. Certainly during the course of that time I was admittedly buying time to get the time to work on it or at various points to find the file. Whether I had said that I had filed the Complaint or I was filing the Complaint or what the precise language was that I had used, I have no recollection.

. . . .

I can't represent to you, in all honesty what my exact words were. Certainly there came a point in time, whether it was in March or April where I definitely told him

that I hadn't filed the Complaint. So what the exact nature of those prior conversations were, what the precise words were, whether I said, I'm going to file a Complaint, they are going to have 35 days to answer, whatever.

[T37-14 to T38-10.]

Respondent also testified about Nabi's claim that he had, late in the case, offered his legal services at a discount. Respondent was adamant that he had made no such concession:

Absolutely not. And I testified to that before, because there was no reason for me to do it like that. If he was a regular paying client, I could understand where there might have been some basis for that. But it was going to be billed to the insurance company, he wasn't paying anything for this to begin with, so why would I say fifty percent or do it for free or something, it just doesn't make sense because he wasn't going to be paying anything anyway.

[T84-16 to 24.]

In mitigation, respondent urged ethics authorities to consider that he represented Nabi during a tumultuous time, when he was swamped with work and trying to train a new secretary. Respondent also urged the DEC to consider that he filed the complaint well within the statute of limitations and that Nabi suffered no damage as a result of the several-month delay.

The DEC found that respondent lacked diligence in his handling of the matter, a violation of RPC 1.3, and failed to "promptly" communicate with Nabi, a violation of RPC 1.4(b). The DEC dismissed the RPC 1.1(a) charge for lack of clear and convincing evidence of gross neglect.

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence.

It is evident that respondent did not stay on top of Nabi's case for the brief time that it was in his office. For about six months, from December 2006 to April 2007, he accomplished little in the case. Respondent admitted that he had lost Nabi's file and that he found it easier to work on the more pressing real estate matters facing him at the time than to look for Nabi's file. We find, and respondent conceded, that his failure to take action constituted lack of diligence, a violation of RPC 1.3.

On the other hand, respondent denied that his conduct amounted to gross neglect, pointing out that he had filed a complaint about five months after receiving sufficient information from his client to file it. Thereafter, he noted, Nabi terminated the representation mere days before he received

a filed copy of the complaint. The DEC agreed that respondent's conduct did not rise to the level of gross neglect. So do we. Once Nabi gave respondent a second chance to file the complaint, he did so within a few weeks. The case was, largely back on track when Nabi terminated the representation.

Unquestionably, however, respondent failed to keep his client adequately informed about important aspects of the case. He and Nabi had several, almost monthly, conversations about the case over the course of the representation. Nabi recalled that respondent had repeatedly told him during those calls that he had filed a complaint. Respondent, on the other hand, only recalled having explained litigation procedure to Nabi. However, he admittedly did not advise Nabi in any of those communications that the file had been lost and that the loss of the file was at the center of his failure to file the complaint any earlier than late April 2007. Respondent also conceded that he had not fully explained the matter to Nabi, a violation of RPC 1.4(b).

One more aspect bears mention. Nabi testified that respondent repeatedly misrepresented the status of the case to Nabi, a contention that respondent never flatly denied. Yet, the complaint did not charge respondent with a violation of RPC 8.4(c).

The issue of misrepresentation is of heightened concern here, because respondent's truthfulness was at the center of his 1992 three-year suspension. There, he made misrepresentations to a court, fabricated a judgment of divorce, caused a judge's false signature to be affixed to that document, and then asked his client to lie for him in court.

Here, when ethics authorities gave respondent the opportunity to downright deny misrepresenting the status of the case to Nabi, he declined to do so. With a three-year suspension for similar misconduct in his background, had to know that his answer would be very closely scrutinized. Yet, he testified that he did not recall exactly what he had told his client about filing the complaint. As the DEC put it, respondent "equivocated" as to his discussion with his client. We find that respondent's multiple misrepresentations to his client constitute an aggravating factor in this instance.

We now address the issue of discipline.

Lack of diligence and failure to communicate with the client generally result in an admonition. See, e.g., In the Matter of Jonathan Saint-Preux, DRB 04-174 (July 19, 2004) (in two immigration matters, attorney failed to appear at the hearings, thereby causing orders of deportation to be entered

against the clients, and failed to apprise the clients of these developments; violations of RPC 1.3 and RPC 1.4(a) found); In the Matter of Susan R. Dargay, DRB 02-276 (October 25, 2002) (failure to promptly submit to the court a final judgment of divorce in one matter and failure to reply to the client's letters and phone calls in another matter, violations of RPC 1.3 and RPC 1.4(a)); In the Matter of Mark W. Ford, DRB 02-280 (October 22, 2002) (violations of RPC 1.3 and RPC 1.4(a); the attorney failed to file a workers' compensation claim and to reasonably communicate with the client about the status of the case); and In the Matter of W. Randolph Kraft, DRB 01-051 (May 22, 2001) (attorney failed to prosecute a case diligently and failed to communicate with the client; the lack of communication included the attorney's failure to notify the client that the complaint had been dismissed for lack of prosecution; the attorney violated RPC 1.3 and RPC 1.4(a)).

In mitigation, respondent urged us to consider that a) he could not keep up with all of the client matters in the office; b) his law office was in turmoil as he trained a new secretary; and c) Nabi suffered no damages by virtue of the delay in filing the complaint.

Even if we were to accept the proffered mitigation, we conclude that the aggravating factors greatly outweigh it. Respondent consciously decided to ignore Nabi's matter once the file was misplaced in the office, choosing instead to address more "pressing" client matters. He also has a significant disciplinary history. In the matter that led to his 2008 reprimand, we were generous to him, when considering his past discipline, stating that

[w]e are aware that respondent received a very serious sanction (three-year suspension) in 1992. We do not believe, however, that this factor should enhance the otherwise appropriate discipline (reprimand) for the aggregate of respondent's infractions here. Respondent's suspension was very serious, but imposed sixteen years ago. In the interim, and until the current transgressions, respondent has practiced law without incident. Also, respondent claimed that his office had spun out of control after the loss of his secretary and that he could not keep up with his practice. He accepted responsibility for his actions and attempted to comply with the requirement that he "zero out" the old trust account. We are, therefore, persuaded that a reprimand adequately addresses the nature of his conduct in this matter.

[In the Matter of Kenneth S. Meyers, DRB 07-411 (May 28, 2008) [slip op. at 12.]

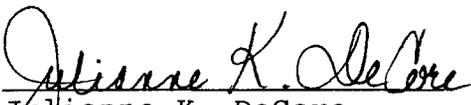
Finally, as noted earlier, respondent repeatedly lied to Nabi about the status of the case, thereby displaying a pattern

of misrepresentation. It is obvious that he has failed to learn from his prior ethics mistakes.

In view of the foregoing, we determine that the ordinary discipline for the charged violations of RPC 1.3 and RPC 1.4(b) (admonition) must be elevated to a censure.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

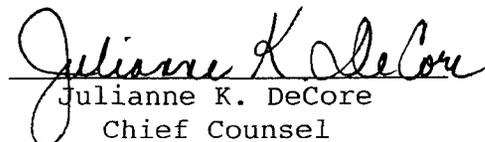
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Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			9			


Julianne K. DeCore
Chief Counsel